§ 8902(m)(1). As amended in 1998, the preemption provision currently provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1) (2000) (codifying Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366 (1998)).

In enacting the current preemption language, which "broaden[ed]" an earlier version of the preemption clause, Congress sought to ensure "the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live." H.R. Rep. No. 105-374, at 9 (1997). Congress added that the amendment "will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts" and "will also prevent carriers' cost-cutting initiatives from being frustrated by State laws." *Id.*

B. The Proceedings Below

During the times relevant to this case, Jose S. Cruz, a federal employee, was enrolled in the Service Benefit Plan. After Cruz was injured in a car accident, HCSC – the Blue Cross and Blue Shield entity administering the Plan in Illinois – provided benefits in connection with his injuries. Subsequently, Cruz reached a settlement with the tortfeasor allegedly responsible for his injuries and, under the settlement, received money substantially in excess of his medical expenses. HCSC then requested that Cruz reimburse the health benefits the Plan had paid, pursuant to the reimbursement provision contained in the Statement of Benefits. Cruz refused to do so, which triggered litigation in both the state and federal courts.

Cruz first brought a putative class action in the Circuit Court of Cook County, Illinois, asserting that HCSC acts improperly in seeking to collect reimbursement amounts that are not automatically reduced to account for the enrollee's attorney fees incurred in obtaining recoveries from tortfeasors. Cruz argued that the "common fund" doctrine, established under Illinois common law, requires such an offset. HCSC removed the state court case to the United States District Court for the Northern District of Illinois, but the district court remanded the case. That suit today remains active in the state court.

In the state court proceedings, the United States filed a "Statement of Interest" and asserted both that FEHBA preempts Cruz's state law complaint and that the lawsuit is barred by the United States's sovereign immunity. In its Statement of Interest, the United States said:

> [P]laintiff's claims are preempted under FEHBA by the terms of the Government contract establishing the Service Benefit Plan. The statute and contract alike were crafted to avoid impairments of the Federal Government interests like those that would be worked by the relief plaintiff seeks. Even absent preemption, the substantive issues in this case call for application not of State law, but of Federal common law, which does not allow plaintiff to obtain the relief he seeks at the expense of the Government and contrary to its interests.

Statement of Interest of the United States at 2, in *Doyle v. Blue Cross Blue Shield of Ill.*, No. 00 CH 14182 (Cir. Ct. Cook County, Ill.) (appearing in *Cruz* record in the 7th Cir. at Exhibit D to Appellants' Mot. to Enjoin Related State Ct. Proceedings or, Alternatively, for Clarification of the Ct.'s Jan. 24, 2005 Decision, filed Mar. 14, 2005).

Notwithstanding the United States's position, the state court has refused to dismiss the action. Last month, the state court certified a class of FEHBA enrollees that will seek refunds of past reimbursement amounts now contained in the federal

Treasury. It did so even though the United States is not and cannot be a party in the state court. *See* 5 U.S.C. § 8912 (providing that the United States may be sued under FEHBA only in federal court).

In the meantime, HCSC and BCBSA brought this action in the district court to enforce the Plan's reimbursement terms. They averred that the court had federal question jurisdiction because the suit was "founded on [FEHBA] . . ., federal contracts and regulations established pursuant to FEHBA, and federal common law." J.A. 2. Cruz moved to dismiss, asserting that the district court lacked federal question jurisdiction.

The district court granted the motion to dismiss. Pet. App. 16a-31a. It concluded that FEHBA reimbursement actions are not governed by federal common law because, in the district court's view, they do not involve "'uniquely federal interests'" and there was no "'significant conflict'" between the application of state law and any federal policy or objective. *Id.* at 25a-27a (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988)). The district court also held that FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1), did not support "a federal common law remedy." Pet. App. 26a-27a.[3]

A unanimous panel of the court of appeals (Judge Kanne, joined by Judges Posner and Williams) reversed. Pet. App. 1a-15a. Though the court recognized that there is no explicit cause of action in FEHBA covering the controversy, it ruled that federal jurisdiction followed from FEHBA's preemption clause. The court noted that the reimbursement terms are "part of the FEHBA-authorized Service Benefit Plan contract" and

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[3] Jose S. Cruz died during the pendency of the district court litigation. Upon joint motion of the parties, the court of appeals substituted his wife, Petitioner Julia Cruz, as representative of Jose S. Cruz. The state court likewise substituted Julia Cruz, as representative of Jose S. Cruz, in the state court.

that FEHBA "dictates that the contract terms trump state law when they relate to the nature, provision, or extent of coverage or benefits including payments with respect to benefits." *Id.* at 8a-9a.

The court then proceeded to "examine the purpose of the preemption provision." *Id.* at 9a. The court noted that "Congress broadened the preemption provision in 1998, intending to expand federal jurisdiction over FEHBA claims even when state law does not conflict with FEHBA contract provisions." *Id.*[4] The purpose of the broadened preemption clause, the court explained, was to advance the goals of "[u]niform administration and cost-savings," which were also goals of the original FEHBA enactment. *Id.* at 9a-10a. These goals would be undermined, the court concluded, if FEHBA contract provisions do not preempt state law regarding subrogation. The court also noted that state subrogation law is preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1144, and, given that rule for private employer plans, "it would be strange to leave regulation to the individual states when the employer is the United States itself." Pet. App. 11a.

On these bases, the court concluded that "state law regarding subrogation is preempted by the reimbursement provision in the Service Benefit Plan." *Id.* at 10a. With state law preempted, the court said it needed simply to "'fill in [FEHBA's] interstices with federal common law.'" Pet. App. 12a (quoting *UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers*, 998 F.2d 509, 512 (7th Cir. 1993)). The

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[4] As originally enacted, the preemption clause provided that FEHBA contract provisions relating to benefits and coverage "preempt any state or local law . . . which relates to health insurance or plans *to the extent that such law or regulation is inconsistent with such contractual provisions*." 5 U.S.C. § 8902(m)(1) (1994) (emphasis added). Congress eliminated the italicized inconsistency requirement when it amended section 8902(m)(1) in 1998.

court added: "With no explicit statutory cause of action on which to rely and with state law preempted, Congress's clear intent to have uniform subrogation rules per the terms of the FEHBA-created contract require 'a judicially-crafted cause of action.'" *Id.* (quoting *UIU Severance*, 998 F.2d at 512-13).

As a result of its preemption ruling, the court found it unnecessary to decide the case under a *Boyle* analysis. But it emphasized that, consistent with *Boyle*, there was no doubt "the impact of reimbursement on the federal Treasury creates a significantly federal interest" and the application of state law would conflict with the federal policy of uniformity. *Id.* at 11a.[5]

DISCUSSION

The court of appeals correctly ruled that federal question jurisdiction exists in this case for reasons well stated in its opinion. Petitioner's criticisms of the court of appeals' decision are ill-founded. In particular, we note three significant statements in the petition that require correction.

First, Petitioner uses an out-of-context quotation from the Statement of Interest filed by the United States in the state court proceedings to suggest that the United States disagrees with Respondents' position on the question presented. *See* Pet. 6. As is apparent from an examination of the entire Statement of Interest, however, the United States strongly supported HCSC's position in the state court. The Statement of Interest

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[5] The court of appeals rejected Cruz's request that it abstain from exercising jurisdiction in favor of the state court suit. Pet. App. 12a-14a. In fact, the court of appeals held that the state court suit was, essentially, an illegitimate one, since it sought "to declare illegal the Service Benefit Plan terms regarding subrogation that OPM promulgated," when OPM was "unable to participate as a party in a state court suit under 5 U.S.C. § 8912." Pet. App. 14a. Cruz has not sought review of the abstention holding.

totaled twenty pages, with the first nineteen pages asserting that FEHBA preempts the Illinois common fund doctrine, that federal common law controls the dispute between the parties, and that the state court case is barred by sovereign immunity. The sentences that Petitioner quotes are found in the last two paragraphs of the United States's brief, which addressed solely whether Respondents additionally could invoke official immunity as a defense to Petitioner's state court action. It also should be noted that the United States's amicus brief at the rehearing stage in *Empire* forcefully asserts that the federal courts have jurisdiction to hear a FEHBA carrier's suit for reimbursement.

Second, Petitioner expends substantial energy arguing that FEHBA's jurisdictional provision allowing for suits in federal court against the United States, 5 U.S.C. § 8912, bars federal jurisdiction over other FEHBA actions. Pet. 8-10. A week after the filing of the petition in this case, this Court reiterated, in *Grable v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2370 (2005), that lack of a federal cause of action covering a controversy is "not dispositive" of the issue whether federal question jurisdiction exists. *Grable* negates a primary criticism Petitioner has leveled against the court of appeals' decision.

Third, Petitioner suggests that, among the circuit precedents with which the Seventh Circuit's decision conflicts, are *Botsford v. Blue Cross & Blue Shield of Montana*, 314 F.3d 390 (9th Cir. 2002); *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994); and *Howard v. Group Hosp. Servs.*, 739 F.2d 1508, 1511 (10th Cir. 1984). There are no conflicts with these decisions. *Botsford* held that the federal courts *do* have jurisdiction over enrollee suits for benefits against carriers (albeit to dismiss them because OPM is the only proper defendant in such controversies), thereby undermining Petitioner's assertion that federal jurisdiction is limited to FEHBA claims against the United States. *See Botsford*, 314

F.3d at 399. *Goepel* involved removal jurisdiction over a state law claim for benefits, with the Third Circuit indicating that the result might be different if the complaint originally were filed in federal court and invoked federal law. *See Goepel*, 36 F.3d at 315-16 & n.3. Finally, *Howard* rejected federal jurisdiction, but rested heavily on OPM regulations that since have been amended expressly to facilitate federal jurisdiction. *Compare Howard*, 739 F.2d at 1511 *with* 60 Fed. Reg. 16,037 (1995) (interim regulations); 61 Fed. Reg. 15,177 (1996) (final regulations).

Notwithstanding these various points of disagreement with Petitioner, Respondents agree with Petitioner that the court of appeals' decision directly conflicts with the Second Circuit's decision in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *petition for cert. filed*, No. ___ (Aug. 8, 2005). Respondents also agree with Petitioner that the conflict concerns an issue of national importance and that it is important for this Court to resolve the conflict. Accordingly, Respondents do not oppose the petition for certiorari.

As explained in more detail in the pending certiorari petition in *Empire*, however, we submit that *Empire* presents a better vehicle for resolution of the conflict than does this case. The procedural context of this case is more complicated than *Empire*, with proceedings continuing in a parallel state court action. On the merits, the breadth of the Second Circuit's decision in *Empire* casts the FEHBA program into considerable disarray, and a decision by this Court in that case may be more effective in eliminating uncertainty and forestalling future disputes than would a decision here. We submit, therefore, that it would be appropriate for the Court to grant certiorari in *Empire* and to hold this case pending the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. ___ (filed Aug. 8, 2005). Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-1657

IN THE

Supreme Court of the United States

JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS, A DIVISION OF HEALTH CARE SERVICE CORPORATION, A MUTUAL LEGAL RESERVE COMPANY; AND BLUE CROSS BLUE SHIELD ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS RESPONDING TO AMICUS CURIAE BRIEF OF UNITED STATES

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SUPPLEMENTAL BRIEF OF PETITIONER CRUZ

NOW COMES Julia Cruz, as Special Administrator to Jose Cruz, Petitioner in Docket No. 04-1657, and presents her Supplemental Brief in response to the United States who, at the invitation of this Court, filed an amicus brief on December 13, 2005.

PREFACE

Notably, the United States supports Cruz's petition, contending that a clear, present conflict exists between the Seventh Circuit's ruling in this case and the Second Circuit's decision in *Empire Health Choice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *reconsideration denied*, 402 F.3d 107, and that this conflict[1] concerns an issue of national importance which can be expected to arise in the future. *See* Brief for the United States as Amicus Curiae at 2, 8-9. ("United States Br. at __").

Where the United States parts ways with Petitioner Cruz is on the merits of the legal issues and the "vehicle" in which this Court should consider this matter. On the merits, the United States argues that federal question jurisdiction exists over reimbursement claims brought by private insurers against insureds who are covered by health plans governed by the Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901, *et seq.* ("FEHBA"). Petitioner, as explained in her initial brief, contends that in this context federal jurisdiction does not

1. The United States agrees with Petitioner that the Circuit conflict extends beyond the Seventh and Second Circuits, to include the Eighth Circuit's decision in *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). United States Br. at 12.

Although the United States and Petitioner disagree over the extent of the conflict that *Cruz*, *Empire* and *Ochs* have with other Circuit decisions, *see* United States Br. at 13-14, this disagreement highlights an important issue in this case, i.e., that a claim for reimbursement is distinct from a claim for benefits. It is only the latter, Petitioner contends, that is subject to federal question jurisdiction.

exist over an insurer's reimbursement claim. Since the parties' merits disagreements are largely addressed in their briefs before this Court, they will not be further raised here.

With respect to the appropriate vehicle for this Court to consider this matter, after acknowledging that the Court should grant this petition, the United States provides little support for its position that the *Empire* case provides the better vehicle. United States Br. at 19-20. The United States' position appears to be strategic, motivated more by its desired outcome rather than a concern for how the cases' procedural postures may affect this Court's review.

DISCUSSION

A. *Cruz*, Not *Empire*, Provides The Better Vehicle For Review

As the first filed petition, the *Cruz* case, not *Empire*, should be the chosen vehicle if only one case is accepted. Petitioner Cruz has vigorously litigated this action in both federal and state courts for several years, and, consequently, would provide this Court with more insightful advocacy on the legal and factual issues. Indeed, Cruz's petition sets forth more relevant legal and factual details regarding the issues in this case than the petition filed in *Empire*, such as raising all points of disagreement amongst the Circuits, setting forth FEHBA's legislative history in order to highlight the limited scope of the statute's preemption provision, and clarifying Blue Cross's role *vis-a-vis* the Government when asserting reimbursement claims (which, as conceded by the Government, involves them "function[ing] as independent economic entities that offer and run their own health insurance plans, performing a role that is not governmental in nature but, instead, is akin to their activities as insurers in the private-sector marketplace."). *See* Cruz's Petition for Writ of Certiorari at 6.

The United States' concern that Petitioner Cruz's on-going state court action may raise issues that are not independently worthy of review is overstated and wrong. In the event the petition is granted, this Court will inform the parties on the issue(s) to be heard and Petitioner Cruz will conform to such instruction. Moreover, the issue of whether federal question jurisdiction exists necessarily involves whether state courts alone should hear the parties' dispute. That Petitioner Cruz has a long, developed history of litigating a parallel matter against Blue Cross in state court will assist, not hinder, this Court's decision. Including this case will ensure that undersigned counsel will be well prepared to respond to any question of how a ruling may affect state court actions.[2]

B. Alternatively, Consolidating The Cases Would Also Be Acceptable

While it would certainly be acceptable to Petitioner Cruz for this case to be considered alone and the *Empire* case stayed, Petitioner is certainly open to having this Court consolidate the *Empire* and *Cruz* cases, as it regularly does in these situations. *See, e.g., Aetna Health, Inc. v. Davila et al.*, 542 U.S. 200 (2004) (consolidated two cases involving similar claims against an HMO; one brought by a participant and the other by a beneficiary); *Exxon Mobile Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005) (consolidated two cases involving gasoline dealers' class actions against gasoline supplier); *Clark v. Martinez*, 125 S. Ct. 716 (2005) (consolidated two similar habeas claims); *Granholm v. Heald*, 125 S. Ct. 1885

2. The United States shows that its suggestion to select only the *Empire* case is grounded in a tactical belief that such a posture will enhance its chances of prevailing on the merits. For instance, in its brief, which purports to address both petitions, the United States takes issue with only arguments raised by Petitioner Cruz, even though the Respondent in *Empire* takes the same position. *See* United States Br. at 4 n.1 (addressing a disagreement with only Cruz); *cf.* Brief of Respondent in *Empire* at 4 (raising same argument supported by Cruz).

(2005) (consolidated two cases; one involving New York's alcohol distribution laws and the other Michigan's alcohol distribution laws because they presented the same question); and *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (consolidated two cases "to consider the common and separate issues presented by both cases."). As the present cases involve substantially identical[3] questions for the Court and given that Blue Cross is represented by the same counsel in both cases, consolidating and hearing both cases is appropriate.

CONCLUSION

The petition for writ of certiorari in this case should be granted.

Respectfully submitted,

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3. Respondent's argument in *Empire*, that the Second Circuit's decision is distinguishable from the Seventh Circuit's on the existence of a state law conflict (*see*, Respondent's Br. at 7) further supports not excluding Cruz from plenary review. Cruz's counsels' experience with dealing with an apparent, direct state law conflict will facilitate this Court's consideration of that matter.